RE MEHAH BINTI MUHAMED & ORS. PRESUMED DECD.; EUSOFF BIN SALLEH, APPLICANT

[O.C.J. (Chang Min Tat J.) January 21, 1972]

[Penang — Originating Motion No. 10 of 1971]

Practice and Procedure — Application by motion to presume death — Declaration.

Land Laws — Conveyancing — Payment not in equal shares — Whether transferees tenants in common or joint-tenants.

This was an application by motion to presume the deaths of six persons. Evidence was sought to be adduced by affidavit, but in the end oral evidence was given by one Omar and by the applicant. The former was a fellow villager and the latter alleged that he was the only grandson of one Ali bin Muhamed, who was a brother of the six persons named. Ali bin Muhamed died on January 15, 1941 and his death certificate was produced, but no certificates were or could be produced in respect of the other six. The purpose of the application was to prove that certain property transferred in 1887 to all seven children of Muhamed as joint-tenants by survivorship, the property devolved to Ali bin Muhamed and from him to Eusoff, the applicant.

The *habendum* of the deed conveyed the property to seven persons, the six persons who paid the purchase price and the transferor as well and though nowhere was it stated as to the respective contributions of the six payers, the payment could not with the intrusion of the transferor be in equal shares.

Held, refusing the application: (1) if the payment was not in equal shares, the conveyance must be treated as one to the transferees as tenants in common;

(2) the object of the application failed. It was not proper for the court to make the order for presuming their deaths for two reasons: (1) the application should ordinarily be made as the law stands, by those who would most likely be the ones to hear from them if alive and (2) any declaration the court might make for the purposes for which it was sought could, in other hands, be misused.

Cases referred to:-

(1) *Robinson* v. *Preston* (1858) 4 K. & J. 505; 70 E.R. 211.

(2) *Bull* v. *Bull* [1955] 1 Q.B. 234, C.A.

(3) *Harrison* v. *Barton* 1 J. & H. 287; 70 E.R. 756.

ORIGINATING MOTION.

Goh Eng Kee for the applicant.

Cur. Adv. Vult.

Chang Min Tat J.: This was an application by motion to presume the deaths of 6 persons, their names being given as Mehah, Hamidah, Etam, Imah, Eaut and Mat Hassan. Evidence was sought to be adduced by affidavit but in the end, oral evidence was given by one Omar bin Mohammad alias Mustaffa and by Eusoff bin Salleh. The former was a fellow villager and the latter alleged that he was the only grandson of Ali bin Muhamed.

It transpired from their evidence that all the persons sought to be presumed dead and Ali were brothers and sisters, all children of Muhamed. The death certificate of Ali bin Muhamed was produced. He died according to the certificate on 15th January, 1941. No certificates were or could be produced in respect of the other six. As to their deaths, the oral evidence of Eusoff bin Salleh could not be regarded as satisfactory. In his affidavit, he referred to the traditional form "to the best of my information and belief", and in oral evidence it transpired that this information was derived from Ali bin Muhammad who 4 or 5 months before his death, had told him that all his brothers and sisters had predeceased him. At this time Eusoff was a mere lad of some 12 years and it must be a remarkable feat of memory to retain this information for 30 years. He did not make use of it until 1971. Then his own father had predeceased his grandfather and he did not stand to inherit directly from the latter, according to the Muslim law of distribution. Omar bin Mohammad, a gentleman of some 76 years, however claimed to know the deaths of all the children of Muhammad and to have attended the burials of at least three of them. He testified that Ali was the last to die. His evidence as to the other three must however be hearsay.

I am advised from the Bar that the other sons and daughters of Muhammad left descendants but that it was considered unnecessary to call them, perhaps in view of the testimony of Omar bin Mohammad, but more particularly as the whole purpose was to prove that certain property transferred in 1887 to all seven sons and daughters of Muhammad as joint-tenants and by survivorship, the property devolved to Ali and from him to Eusoff, and they had no interests therein.

Since so much turns on the conveyance, I think I would reproduce it here.

It is relatively short:

"KNOW ALL MEN BY THESE PRESENTS, THAT I Mat Hassan of Aier Etam in Penang the administrator to the Estate of Eusoof deceased in consideration of the sum of DOLLARS One hundred ($100/-) to me paid by Ameedah, Mehah, Etam, Eemah, Allee, and Eaut all of Aier Etam in Penang (the receipt whereof I hereby acknowledge) do hereby grant, unto the said Ameedah, Mehah, Etam, Eemah, Allee and Eaut.

Heirs, Executors, Administrators and assigns.

All that piece of land, messuages and hereditaments situate in the District of Aier Etam in Penang being part of Grant No. 1618 dated the 1st June 1805. Acquired right to by the said Eusoof deceased by a Deed poll dated the of September 1860 Register No: 301 of 1860/61 and which piece of land is measured and bounded as described in the said Deed and is Estimated to contain about 202 square Jumbas.

TO HOLD the same premises unto and to the use of the said Ameedah, Mehah, Etam, Eemah, Allee, and Eaut and me Mat Hassan my and their Heirs Executors, Administrators and Assigns, for ever.

In WITNESS WHEREOF I have hereunto set my Hand and Seal this 1st day of December in the year One thousand Eight hundred and Eighty seven (A.D. 1887).

The Mark & Seal
X
of Mat Hassan".

There was no subsequent transaction in respect of this piece of land and in the interim register compiled in the course of the transition of the old registration of deeds in Penang to the registration of titles under the National Land Code No. 56 of 1965 it is recorded that all seven of them were the proprietors and a certificate to this effect has been issued. On the face of the deed of conveyance only their personal

names were given. There was nowhere any indication that they were the children of Muhammad.

A few words on the form of the conveyance might not appear inappropriate.

First, it was obviously an ordinary form and despite the clear provisions of section 55(1) of the Conveyancing and Law of Property Ordinance of 1886 (Cap. 118 Laws of the Straits Settlement) under which the conveyance was made and which was in fact the operative enactment relating to transactions in land in Penang, until its repeal initially in part in 1963 and finally in 1965 and replacement by the National Land Code No. 56 of 1965, it continued to use the words of limitation to heirs. Their use was the common practice in England before 1882, *i.e.* before the coming into force of the Conveyancing and Law of Property Act 1881 (44 & 45 Vict. Ch. 41) and was sufficient to effect the grant of an estate in fee simple. After 1881, the old words of limitation could still be used but by the Act of 1881, it was sufficient to use the words "in fee simple" without the word "heirs". Our own Cap. 118 was passed largely on the lines of the English Act of 1881 and in fact, section 55(1) of our Ordinance reproduced largely section 51 of the English Act, except for references to estates in tail, which by section 51 of our Ordinance were abolished. Nothing therefore really turns on this part of the *habendum*.

Secondly the form was a printed one with blanks left for the parties, the consideration, and the subject matter. In particular the word "Heirs" was a printed word and what appears to me pertinent is that it was followed by "Executors, Administrators and assigns for ever", also in printed form. Now the use of this extended phrase must appear to be peculiar to local practice because nowhere in Vol. 12 of *Butterworth's* Encyclopaedia of Forms and Precedents on Sale of Land (1907) (1st Edition), an encyclopaedia of particular reference since all the forms were based on the parallel English Conveyancing and Law of Property Act of 1881, could be found its use.

The whole point of the contention of learned counsel for the applicant was that no words of severance were employed to indicate that the conveyance was to the transferees as tenants in common and he relied solely on the statement of the law which appears at page 330 of *Halsbury's* Laws of England (3rd Edn.) Volume 32 and which is in these words:

"Where land was granted to two or more persons for the same estate, whether for an estate of freehold or of leasehold, and no words were added indicating that the grantees were to take separate interests, they become joint tenants."

There can of course be no doubt about the accuracy of this statement but it does not, with respect, state the entire position and indeed, under the same rubric, on the following page there occurs this passage:

"There were however special cases in which notwithstanding the absence of words of severance a court of equity would declare that there was a tenancy in common in equity."

The intervention of equity was in several cases based on the fact of the payment of the purchase money. While it was settled law that a purchase by two or more persons contributing equal sums created *prima facie* a joint-tenancy, a conveyance to purchasers who provided the purchase money in unequal shares was, *inter alia*, in *Robinson* v. *Preston*[1] and in *Bull* v. *Bull*[2] held to constitute them tenants in common notwithstanding the form of the conveyance.

In my view the deed of conveyance within its four corners patently determines on which side of the line the conveyance falls. The transferor was one Mat Hassan of Aier Etam, the administrator of the estate of Eusoff. The deceased was obviously not his father, nor was he the father of the other purchasers. The conveyance was not a vesting assent by a legal personal representative to the beneficiaries of the deceased proprietor. The consideration was therefore real and it was, as expressed in the deed, provided by six persons to the transferor. The *habendum* nevertheless conveyed the property to seven persons, the six persons who paid the purchase price and the transferor as well and though nowhere was it stated as to the respective contributions of the six payers, the payment could not with the intrusion of the transferor be in equal shares. It follows that if the payment was not in equal shares, the conveyance must be treated as one to the transferees as tenants in common.

For myself, I would, with all respect to learned counsel for the applicant, treat the extra words in the *habendum* "executors, administrators and assigns for ever" as words of severance. If before death any one of the transferees could assign his interest or if after death his interest devolved on his legal personal representatives, there could not two if not three of the four unitiers which are the characteristics of a joint-tenancy, *viz*, the unity of title and interest if not of possession. The additional words are, in my view, words of severance and I hold therefore that the conveyance was to the transferees as tenants in common.

Having regard to the view I have taken of the deed, it became a matter of regret to me that the course chosen in bringing the matter to court was to treat the conveyance as an outright conveyance to joint-tenants, as that course has deprived the court of any parole evidence as to the surrounding circumstances of the conveyance, evidence which is clearly admissible under section 92(f) of the Evidence Ordinance: See also *Harrison* v. *Barton*.[3] It has also not made available such admissible evidence as the other transferees or their descendants and next of kin might have on the dealing.

But insofar as the application is concerned, the object fails and while I am fairly certain that the persons mentioned in the motion are all dead, I do not consider it proper for me to make the order for presuming their deaths for two reasons. In the first place the application should ordinarily be made as the law stands, by those who would most likely be the ones to hear from them if alive and secondly, any declaration I might make could, in other hands, be misused.

For the reasons I have given, I must decline making the order sought.

Application refused.

Solicitors: *Goh Eng Kee & Co.*